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BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION
DENISE JUNEAU
STATE OF MONTANA

IN THE MATTER OF [student]	)	OSPI 2012-01
	)	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

BACKGROUND

On or about January 20, 2012, Petitioner **, acting under the provisions of a Specific Power of Attorney, requested a due process hearing for [student] against Respondents Pine Hills Youth Correctional Facility (Pine Hills), the Montana State Prison (MSP) and the Montana Department of Corrections (MDOC). On January 31, 2012, the Office of Public Instruction appointed Hearing Officer Leslie Halligan. The parties engaged in mediation but on June 11, 2012, reported that mediation efforts had not been successful. An initial hearing was scheduled for July 17-19, 2012, but at the request of the parties, was rescheduled to August 29-31, 2012. On July 18, 2012, Petitioner filed an amended request for due process hearing. On August 19, 2012, the parties stipulated to a bi-furcated hearing with the initial hearing being limited to the issue of whether [student] was denied a free appropriate public education (FAPE), both

procedurally and substantively, while incarcerated at Pine Hills from May 7, 2010 to May 12, 2011, and since he has been incarcerated at MSP beginning May 12, 2011 and continuing thereafter. In the event it was determined that there was a denial of FAPE, the parties stipulated to the scheduling of a second hearing to determine appropriate remedies.

Throughout these proceedings, [student] has been represented by Andrée Larose, Morrison, Motl & Sherwood, PLLP. The MDOC was represented at the hearing by Colleen Ambrose, MDOC Bureau Chief, and Diana Koch, MDOC Chief Legal Counsel.

On August 29, 30 and 31, Hearing Officer Leslie Halligan convened the Due Process Hearing at the Montana State Prison in Deer Lodge, Montana. At the hearing, the following witnesses provided testimony on behalf of [student]: ** (Petitioner), attorney-in-fact for [student] since September 2011; Amy Marie Burton (Ms. Burton), School Psychologist, who was offered and qualified as an expert witness; Robin Marie Goetz (Ms. Goetz), Special Education Teacher/Coordinator for [student] during the 2010-2011 school year at Pine Hills School; Michael Jakupcak, Ed.D. (Dr. Jakupcak), who was offered and qualified as an expert witness; and ** (Mr. **), rebuttal witness. The following witnesses provided testimony on behalf of Respondent: Tiffany Morrison (Ms. Morrison), Teacher for [student] at Montana State Prison (MSP); Ms. Goetz, Special Education Teacher/Coordinator for [student] during the 2010-2011 school year at Pine Hills School; Joseph Raymond Haffey (Mr. Haffey), School Psychologist at Great Divide Educational Services Cooperative, who evaluated [student]; Maxine Hardy (Ms. Hardy), Teacher at Pine Hills School; Steve Ray (Mr. Ray), Superintendent of Pine

Hills Youth Correctional Facility (Pine Hills); and Valorie Ericson (Ms. Ericson), General Education Testing Program (GED) Test Administrator at MSP.

The parties stipulated to the admission of Joint Exhibits: J-1, J-2, J-3, J-4, J-5, J-6, J-7, J-8, J-9. Petitioner's Exhibits A, C, E, G, H, I, were received into evidence without objection. Petitioner's Exhibit F, an independent educational evaluation (IEE) prepared by Shane Shackford, Ph.D., was received into evidence over the objection of Respondent, but admitted for the limited purposes of confirming that an IEE was completed at the request of Petitioner and that the IEE was available to [student]'s Evaluation Team at MSP to review. Respondent's Exhibit 3 was offered over objection; and the evidentiary ruling was reserved. Respondent's Exhibit 3 shall not be admitted into evidence, because the document was not disclosed at least five (5) days prior to the hearing in accordance with 34 C.F.R. § 300.512(a)(3).

[Student], through Petitioner, alleges that MDOC has violated [student]'s right to a free appropriate public education (FAPE) under the Individuals with Disabilities Improvement Act of 2004 (IDEA), 20 U.S.C. § 1400 *et. seq*. (2004). [Student] contends MDOC failed to provide him with FAPE from September 2010 through April 2011 during his incarceration at Pine Hills, and from April 2011 through May 2012 during his incarceration at MSP. Second, [student] contends that MDOC's termination of special education and related services by awarding him a regular credit-based diploma also violated his rights under the IDEA.

The MDOC maintains that [student] was provided FAPE from the time he entered Pine Hills on May 19, 2010 until he achieved and was awarded a high school diploma on May 29, 2012. Additionally, MDOC asserts that [student] was appropriately reevaluated, an appropriate IEP was developed for [student] that was designed to

confer educational benefit and that staff at Pine Hills worked with [student] to achieve his IEP goals. After [student]'s transfer to MSP, MDOC continued to provide [student] with educational opportunities, in that [student] participated in Adult Basic Education, took and passed four of five GED tests, and worked with an MSP teacher to obtain the English credits required to obtain a high school diploma. On May 29, 2012, [student] received his high school diploma which was issued on May 23, 2012, and, as a result, MDOC asserts that any obligations to [student] under the IDEA were extinguished.

FINDINGS OF FACT

1. [Student] was born in May 1993 and is currently 19 years old.

2. [Student] was first evaluated and identified as a student qualified to receive special education and related services pursuant to the IDEA by the ** School District #5 in November and December 2003, when he was ten (10) years old. Consent to the initial evaluation was provided by his biological mother, **, on November 20, 2003. [Exhibit (Ex.) J-3, 1138-1142].

3. At the time of the initial assessment, [student]'s foster parent provided information about [student] through completion of the Conners' Parent and Teacher Rating-Scale and by participating in the Child Study Team (CST) meeting. [Ex. J-3, 1147, 1148, 1142].

4. After the initial assessments and evaluations in 2003, the CST determined that [student] was eligible for Special Education Services under the category "Other Health Impairment." [Ex. J-3, 1138-1149]. At the time of this determination, a physician verified the medical diagnoses of Post Traumatic Stress Disorder,

Oppositional Defiant Disorder and Depressive Disorder, as required by ARM 10.16.3018. [Ex. J-3, 1145]**.**

5. When [student] was 13 years old, an IDEA three-year reevaluation was conducted (December 20, 2006) by ** School District #*. At the December 20, 2006 meeting, [student] again was represented by a foster father, a CASA volunteer, and a representative from the Department of Public Health and Human Services, Child and Family Services (CFS); his biological mother did not participate in the 2006 meeting. [Ex. J-3, 1167]**.** The functional behavioral assessment identified the complexity of [student]'s history, with involvement from a variety of agencies: "Department of Family Services (CFS), CASA, a foster parent, the court system, past treatment centers and counseling services." [Ex. J-3, 1169]. During this reevaluation, the criteria for Other Health Impairment (OHI) and Emotional Disturbance (ED) were completed and attached to the Eligibility Determination. The CST determined that [student] was eligible for special education as a student under the criteria of OHI because of ADHD and an emotional disturbance. [Ex. J-3, 1163-1167].

6. On February 16, 2007, [student] admitted to committing the offense of Sexual Intercourse without Consent, which occurred before [student] attained age 18. This offense, if committed by an adult, would have been a felony offense. [Student] was declared a delinquent youth and a serious juvenile offender; and was placed on formal probation until the age of 18. As a condition of his probation, [student] was ordered to successfully complete the sex offender program at a residential treatment facility in San Antonio, Texas. On April 11, 2008, [student] was found to have violated his probation and was ordered to complete sex offender treatment at another

treatment facility, Southern Peaks Regional Treatment Center (Southern Peaks). [Ex. J-1, 111-117].

7. On May 13, 2008, Southern Peaks provided notice to [student]'s CFS Case Worker of a change in [student]'s educational placement and of a meeting scheduled for May 23, 2008. In addition to the notice, Southern Peaks sought releases from CFS to reevaluate [student] [Ex. J-2, 590-597]. The records indicated that [student]'s biological mother was not involved in [student]'s education at this time. [Ex. J-2, 597].

8. On or about September 22, 2009, Southern Peaks again obtained consent to evaluate [student] from Carrianne Stocker, CFS Case Worker. [Ex. J-2, 584-589].

9. On September 29, 2009, Southern Peaks convened an IEP meeting for [student]. During that meeting, Carrianne Stocker, CFS Case Worker, was identified as the Student's Parent or Guardian; the documents note that an Educational Surrogate Parent had not been appointed. [Ex. J-3, 552]. Again, there is no reference in the educational records to [student]'s biological mother being involved in [student]'s education.

10. On May 7, 2010, [student] was found to be in violation of probation for his failure to complete sex offender treatment at Southern Peaks and he was committed to the custody of MDOC for placement at Pine Hills until age 18. [Ex. J-1, 111-116].

11. The Department of Corrections operates a year-round school on the campus of the Pine Hills for residents incarcerated at the facility. Pine Hills School is a state-funded school. [Prehearing Order, Stipulated Facts, no. 2]. Students that attend Pine Hills school have varying degrees of ability, stay for an average of six to eight months, are generally in classes of about 8 to 10 students and attend classes

with students of other ages and who are in various grade levels. [Tr. 269:22-25, 270:1-25].

12. Pursuant to an Interagency Agreement executed by MDOC and the Office of Public Instruction in August 2009, MDOC provides educational services to individuals with IDEA disabilities committed to the youth correctional facilities described in Mont. Code Ann. § 52-5-101. Pursuant to the agreement, individuals who are incarcerated in an adult correctional facility may be eligible to receive educational services if the individual is between ages 18-21 and received IDEA services and had an IEP during their last educational placement. The agreement outlines the availability of modifications to the least restrictive environment requirement and transition services. If an individual would be 22 years or older before being released from prison, the transition requirements of the IDEA did not appy. [Ex. J-3, 1082-1085].

13. On May 19, 2010, [student] arrived at Pine Hills. Like other students who enter Pine Hills School, [student] was given a California Test of Basic Skills (CTBS) on May 20, 2010. [Tr. 271-274; 381:15, Ex. J-2, 527]. The CTBS test is a comprehensive academic test which assesses reading, vocabulary, language arts, language mechanics, math computation, mathematics and spelling. [Student]'s CTBS scores from the May 20, 2010 test were low, showing [student] at a third, fourth grade level on reading and language; mathematics at eighth grade; math computation at second grade, almost third; and spelling at twelfth grade. [Tr. 272:1-9]. It was the practice of staff at Pine Hills school to administer the CTBS again after three months, because experience has shown that there are a number of circumstances that may cause a student to test poorly upon admission. The CTBS was administered to

[student] again on August 19, 2010. At that time, [student].'s scores indicated a 7.8 grade level in reading; a 5.4 grade level in language arts, and an 8.3 grade level in math computation. [Ex. J-5, 1310].

14. Pine Hills did not receive [student]'s educational records until June 22, 2010. The school records received by Pine Hills included [student]'s IEP, dated September 28, 2009, prepared at Southern Peaks; IEP procedural documents and WRAT-3 testing results. [Ex. J-2, 528-531, 551-570, 584-598; Prehearing Order, Stip. Facts, no. 3].

15. Ms. Goetz determined from the Pine Hills records that ** was [student]'s parent. The demographic information in [student]'s file also provided an address for [mother] in **, Montana, and her telephone number. [Tr. 124:22-25, 125:1-8, 283:1-24; Ex. J-4].

16. On August 26, 2010, Ms. Goetz sent the Evaluation Plan for [student] by certified mail, return receipt requested to [mother], [student]'s mother, at the **, Montana address, for her approval and consent. [Mother} did not respond to the request for consent to evaluation. [Prehearing Order, Stipulated Facts, no. 5]. The envelope sent to [mother] was received back at Pine Hills on September 23, 2012, after the date of the Evaluation Report Team meeting, stamped as "Unclaimed." [Ex. J-3, 611].

17. On September 2, 2010, Ms. Goetz, sent a notice of the Child Study Team (Evaluation Report Team) meeting and IEP meeting, both scheduled for September 16, 2010, to [student]'s mother at the same ** address by certified mail, return receipt requested. [Ex. J-2, 580; Ex. H, 2]. The envelope was received back at Pine Hills on

October 7, 2010, stamped as follows: "Return to Sender, Unclaimed, Unable to Forward." [Ex. H, 3; Ex. J-2, 626].

18. On September 10, 2010, Ms. Goetz sent a second "reminder" notice of the scheduled CST and IEP meeting to [mother] at the same address in ** but it was received back at Pine Hills on September 20, 2010, stamped as follows: "Return to Sender, Attempted – Unknown, Unable to Forward." [Ex. J-2, 582, 600; Ex. G]. According to Ms. Goetz, this reminder was not sent by certified mail. [Tr. 129:2-3].

19. On September 20, 2010, the Evaluation Report and the IEP were sent to [mother] for her review and approval at the same ** address by certified mail, return receipt requested, despite the return of all of the prior mail. [Ex. J-2, 599; Ex. H, 4]. Again, these documents were returned to Pine Hills on October 4, 2010, stamped as unclaimed. [Ex. J-2, 501].

20. Ms. Goetz indicated that she did not pursue further efforts to contact [student]'s biological mother. At no time while [student] was incarcerated at Pine Hills did Ms. Goetz have communication with [mother].

21. Ms. Goetz explained that Pine Hills School, by its nature, has a population of children who do not remain for long periods of time. Students may be there for months, rather than years. Ms. Goetz testified that it is not uncommon for special education related mail sent to student's parents to be returned to Pine Hills as undeliverable or unable to be forwarded. [Tr. 137:13-23; 285:21-24]. Ms. Goetz attempted unsuccessfully by mail to notify [student]'s parent of the need for reevaluation and of the ER meeting [Tr. 283-285].

22. Pine Hills followed appropriate procedures to mail the required notices to [student]'s biological mother. However, after all of the notices were returned to Pine

Hills unclaimed or undeliverable, Pine Hills should have attempted to contact [mother] by another means, and not simply rely on mail. Pine Hills should have attempted contact using the telephone number for [student]'s mother, and if that was unsuccessful, contact with either [student]'s CFS case worker or probation officer may have resulted in information to facilitate contact with [mother]. These efforts would have been reasonable, especially in light of the information obtained from Southern Peaks that indicated a lack of participation by [student]'s mother in his treatment or education. While [student] was at Southern Peaks, a CFS Case Worker had been identified as [student]'s guardian and there had been some involvement by [student]'s probation officer; but the records do not identify any involvement or participation by [student]'s biological mother.

23. If, after taking these efforts, [student]'s mother could not be contacted, Pine Hills should have initiated the appointment of a surrogate parent. Upon the appointment of a surrogate parent and the involvement of the surrogate parent, Pine Hills could have amended [student]'s Evaluation Report, and reconvened the IEP Team to comply with the procedural requirements established under the IDEA.

24. As a result of the return of the documents mailed to [mother] and the lack of other efforts to contact her, Pine Hills did not obtain consent to evaluate [student]; did not obtain relevant information about [student]'s educational history; and developed an IEP without the required IEP team participants. By failing to obtain the necessary consents or involve [student]'s parent or a surrogate parent in the IEP process, MDOC failed to comply with the procedural requirements of the IDEA and Montana law.

25. On August 24, 2010, Ms. Goetz and Lorri Coulter, School Psychologist, Big Country Special Education Cooperative, reviewed [student]'s existing evaluation data and determined that additional evaluation procedures were needed as part of his comprehensive three-year reevaluation. At the recommendation of Ms. Coulter, a psychological evaluation was not administered. [Tr. 121:15-20].

26. [Student]'s educational records from Southern Peaks identified "SIED" or Serious Identifiable Emotional Disability as [student]'s primary disability under the IDEA and applicable state law. Ms. Goetz equated this diagnosis with "Emotional Disturbance" as defined in Montana. [Tr. 280:11-25]. Ms. Goetz testified that she did not have access to [student]'s medical records at Pine Hills and did not consult with [student]'s psychiatrist to determine whether any other disability category should be considered. [Tr.199:10-25.]. Ms. Goetz and Ms. Coulter did not try to obtain and review any mental health evaluations, the discharge summary from Southern Peaks, or other medical or psychiatric information contained in [student]'s treatment records at Pine Hills.

27. The Evaluation Plan identified the need to update behavior assessments and conduct an "interview based on setting." [Ex. J-2, 507-508]. A behavior rating form was completed by two teachers and general teacher reports were compiled by the Math, Applied Physical Science, Media Arts, and Office Occupations teachers at Pine Hills. Additionally, a CTBS Basic Battery Plus test and a Kaufman Brief Intelligence Test were administered on May 20, 2010. With the exception of spelling, all of [student]'s scores on the CTBS test ranked in the bottom ten percent (10%). [Ex. J-2, 509-531].

28. After review of the evaluative data and discussion of [student]'s educational needs and classroom behaviors, the Evaluation Team, then developed the IEP. As to parental involvement, the IEP indicated that the parent was "unable to attend meeting." With regard to the need for reevaluation, information in the IEP indicated: "the parent and the school district agree that a reevaluation **is unnecessary** at this time to determine whether the student continues to have a disability and needs special education. EVALUATION REPORT HELD TODAY." (emphasis provided). [Ex. J-2, 547].

29. [Student], like other students at Pine Hills, was evaluated immediately (on the day after his arrival) to determine the appropriate grade level for his instruction. He was provided instruction essentially on an individual basis, given the structure of the school. As noted on the IEP, Pine Hills is a 12-month school program, in which all students with or without disabilities must attend. [Ex. J-2, 546].

30. In examining the IEP, the behavior disorders identification scale indicated only two areas that were outside of the average or norm, interpersonal relations and unhappiness/depression. [Ex. J-2, 538]. The IEP also indicated in the consideration of special factors, that [student]'s behavior did not impede his learning or that of others. [Ex. J-2, 540]. With regard to the identified area of Classroom Behavior, the present level of academic achievement and functional performance indicated: "Teachers report that [student] doesn't always follow classroom rules and expectations. He also has some difficulty remaining on task." The measurable annual goals associated with this area were as follows: 1) "[student] will demonstrate the ability to follow classroom expectations 90% of the time as measured by teacher data;" and 2) "[student]. will

remain on task at least 35 minutes of the class period to be measured by teacher observations and data."

31. [Student]'s IEP reflects a progress report on January 20, 2011, which indicated that as to goal no. 1, [student] was expected to meet the goal; and as to goal no. 2, a question mark (?) is recorded. [Ex. J-2, 543]. In the area of math, the present level of academic achievement and functional performance indicated: "[student] will improve his overall math skills from 7th grade to 8th grade, too (sic) be measured by assignment complete, teasts (sic), and teacher data.] On the January 20, 2011 progress report, it is noted "has met Math requirement for graduation – no longer in Math." [J-2, 544]. This notation is consistent with the testimony provided by Ms. Hardy which indicated that [student] was withdrawn from math so that he could receive additional instruction in the area of English.

32. As to supplemental aids and services, the Pine Hills IEP listed a number of specific accommodations and modifications for [student]. These included: "check for instruction understanding/clarification; modified/shortened assignments, present assignments in smaller chunks; extra time to complete assignments/tests; provide a copy of class notes; in Math-note cards with formulas and reminders of problem solving operations; test retake if below 70%."[J-2, 546]. There was a notation to "consult with teachers on classroom behaviors & math problems." [J-2, 546]. These references are consistent with the information contained in the Southern Peak's IEP Summary. [Ex. J-2, 563-564].

33. Additionally, Pine Hills identified areas of interest for [student] for post-secondary activities in the Transition Services section of the IEP as a result of an interview with [student] 9/7/2010, and completed the Wide Range Interest &

Occupation Test 2. [Student] was interested in attending a tech school to learn computer programming and wanted to stay in Montana. As to the transition education goal, the IEP listed: "Within one year of graduating from high school, [student] will be enrolled in a tech collge (sic) studying computer programming." The transition employment goal was: "Within six months of graduating from high school, [student] will be employeed (sic) at least part-time." Other than identifying Math and Classroom Behavior as a transition service under the transition service area of instruction, no other transition services were listed. The IEP indicates: "In most cases students are not at PHYCF for their entire high school program. When a student arrives, transcripts from previous placements are requested. The guidance counselor then reviews the transcript and appropriate classes are chosen." [Ex. J-2, 542]. The IEP indicated that [student] had earned 13.75 credits and his anticipated graduation date was 2012. [Ex. J-2, 542].

34. As part of the IEP, Math and Classroom Behavior were noted on the Transition Services section, with .5 hours per week of special education being provided in each of these areas, for one total hour per week of special education. [Ex. J-3, 541-547]. In comparison, while [student] was attending Southern Peaks, he was to receive 20 hours each week of direct special education and related services, and 10.50 hours of indirect services, like case management. [Ex. J-2, 566].

35. Ms. Hardy believed that the IEP developed by Pine Hills on September 16, 2010, was reasonably intended to confer educational benefit on [student]. She also believed [student] progressed toward the three measurable goals in the IEP. Ms. Hardy also reaffirmed her belief that [student] earned the grades and quarter credits that she awarded him for the summer and fall sessions. [Tr., 404.] However, when

asked about the IEP review that was conducted on January 20, 2011, she advised that [student] had been working on seventh grade math and was about to progress to the eighth grade math, but was withdrawn from her class because she was told by the guidance counselor that [student] had met his IEP math goal, since he had his math requirements for graduation, and since he was missing credits in reading for graduation, that he needed to be put in a reading class instead. [Tr. 401:24-25, 402:1-7]. The IEP indicates that when it was reviewed on January 20, 2011, [student] "ha[d] met Math requirements for graduation – no longer in Math." [Ex. J-3, 544].

36. In May 2011, as a result of concerns that [student] had not consistently participated in sex offender treatment, was a high risk to re-offend, was not suitable for community placement and needed to complete sex offender treatment in a secured facility, the ** Judicial District Court determined that [student] would be transferred on his 18th birthday to the Montana State Prison, the only secured facility available to provide [student] with this treatment. The Court also transferred jurisdiction over [student] to the District Court pursuant to Mont. Code Ann. § 41-5-208. The District Court ordered MSP "to make any accommodations necessary for the Youth's Asperger's Disorder." As a result of this order, [student] would not be eligible for parole until completion of treatment, and upon parole would be supervised by MDOC. [Student]. was committed to MDOC until age 25 or until he was sooner released by MDOC. [Ex. J-1, 111-117].

37. On May 12, 2011, [Student] was transferred from Pine Hills and incarcerated at MSP in Deer Lodge, Montana. [Prehearing Order, Stipulated Facts, no. 1, in part.]

38. On September 14, 2011, [student] submitted an Inmate/Offender Informal Resolution Form, claiming that he was "one high school credit from getting [his] high school diploma and graduating at Pine Hills." He said that he "worked so hard to get that far but got sentenced to MSP before [he] could complete school & graduate." He "had an IEP & it helped a lot to get that far." He asked to set up an IEP with Andrée Larose. [Ex. J-3, 872].

39. On September 16, 2011, [student]'s IEP from Pine Hills dated September 16, 2010 expired.

40. On September 23, 2011, [student] granted ** a power of attorney to assist him in advocating for his educational rights under the IDEA. [Ex. I; Tr. 19:10-13]. A second, similar power of attorney was granted by [student] to ** on August 21, 2012. [Ex. E].

41. ** testified that she initially came to know [student] as a young child while he was in a treatment facility. She and her husband later became involved with him through Big Brothers Big Sisters as a Big Couple. Their contacts were severed when [student] was transferred to Texas for treatment in approximately 2008. [Tr. 12-15]. She reestablished contact with [student] while he was at Southern Peaks and began having more regular contact with him while he was at Pine Hills; she was allowed a phone call once every two weeks. She also had regular contact with [student]'s therapist at Pine Hills to make certain that she was not undermining anything in his treatment goals. [Tr. 17:2-24].

42. When [student] was transferred to MSP, he was referred by Ms. Ericson, the GED examiner, to Ms. Morrison, the GED teacher. Ms. Morrison began working with [student] the end of July 2011. [Tr. 251:11-17]. [Student] was given TABE tests at

that time, which assist in determining the appropriate grade level for instruction. [Tr. 266:4-9]. Ms. Morrison indicated that on language skills, [student] was tested in July 2011 and he achieved a twelfth grade level in language; in the reading TABE test he tested at a sixth (6.4) grade level. After about 60 hours of instruction, he took another reading test and the results placed him at a ninth (9^{th}) grade level. [Tr. 255:15-23]. This testing was administered again in October 2011. [Student] improved his reading from 6.4 in June to 9.4 in October. [Tr. 255:18-23]. Ms. Morrison said that once a student achieved TABE tests of a 9.0 grade level then preparations were made for the GED tests, by working in the GED books, rather than the TABE books. [Tr. 256:1-7].

43. [Student] took four of the five GED tests in December 2011, and passed all four of the tests: science, social studies, language, and reading. [Student] continued to participate in the GED classes, but in late January became reluctant to continue with the GED class in math skills because school classes began early and he wanted to get more sleep. [Tr. 257:2-24].

44. Approximately five months after [student]'s request, MDOC contracted with Great Divide Education Services Cooperative to conduct a reevaluation of [student]. School Psychologist Ray Haffey completed the reevaluation after reviewing educational records and administering psychological and academic achievement testing. These tests included the BASC-2, Conners 3, the BRIEF and the ASVAB. [Ex. J-3, 826-830; Ex. J-3, 858-864]. In addition, he spoke with [student] about career options. [Tr. 320-323]. Mr. Haffey said that he did not find any reference to a clinical diagnosis of Asperger's disorder in the records that he reviewed prior to conducting the reevaluation. [Ex. J-3, 868-864, Tr. 320:3-10].

45. Mr. Haffey noted several areas of concern as a result of his evaluation. He noted that there were some clinically significant concerns in the areas of atypicality, in social stress, in anxiety and depression, withdrawal. Depression was kind of at the at-risk level; withdrawal was at the clinically significant area. There were some significant concerns in the area of impulsive tendencies on the self-report; peer relationship issues; inattention and impulsivity, and concerns in the area of emotionality. [Tr. 326-329].

46. During the interim period, [student] was administered an independent educational evaluation by Shane Shackford, Ph.D., an independent clinical and school psychologist, at the request of **, through Ms. Larose. [Ex. F].

47. In April 2012, Ms. Morrison was contacted by Larry Burke, her boss, and asked if she could advise him of how many hours [student] had been in school and what he had been working on. Mr. Burke told her that [student] was just a couple credits short in reading and asked if she could work with him on reading for roughly 40 hours; then they would look at giving him the credits he needed. Ms. Morrison then began working on reading with [student]. [Tr. 258:9-24].

48. Ms. Morrison said she met with [student] and asked if he would be willing to work with her on his reading, so that Pine Hills would award him those credits. Since GED and high school were different, she asked [student] pick out a novel to read. [Student] chose the book, “The Hunger Games.” She said she gave him vocabulary, comprehension questions, and some literature activities related to the novel; would correct the assignments and check his progress. He also had two quizzes. She reported that he did very well on the questions and the vocabulary and got 100 percent. [Tr. 259:3-25, 266:16].

49. At the request of Mr. Burke, Ms. Morrison tested [student] with the reading and language TABE tests on May 18, 2012. The May tests indicated that [student] dropped back to a 6.4 grade level in reading; and he dropped from at 12.1 grade level in language to an 8.4 grade level. [Tr. 260:19-25, 261:1-7]. Ms. Morrison said that she believed the scores went down because once [student] had taken his GED test in December, he did not do much work in language. Between December and January, [student] was working on math, because that was the last subject area that he had to do. [Tr. 261:10-19]. Ultimately, [student] did not take the GED math test.

50. On approximately May 21, 2012, Ms. Morrison notified Mr. Burke that [student] had completed 47.5 hours of work in reading. [Tr. 260:3-13].

51. MDOC provided academic instruction to [student] on an individual basis by a certified regular education teacher and provided some GED instruction. These services were provided to [student] so he could complete the hours of instruction that were associated with obtaining a unit of credit. The educational materials provided by Ms. Morrison were selected to encourage [student]'s participation and completion of his English credits. [Tr. 212-214].

52. Ms. Morrison said that based on [student]'s improvement from sixth grade to ninth grade in reading as shown on the TABE test scores, his good grades on the GED subject tests, and his work on the novel and assignments, she believed that [student] received educational benefit and made progress. She also believed that [student] earned the remaining credit that was required for his high school diploma. [Tr. 261, 264-265.]

53. Steve Ray, Pine Hills Superintendent, approved the issuance of a diploma to [student] after Mr. Ray received notification that [student] had completed the

required number of hours working on English and reading skills and that he received a grade for that work. [Tr. 410:9-17].

54. Pine Hills School issued a diploma to [student] on May 23, 2012.

55. On May 29, 2012, MDOC convened an Evaluation Team Meeting. Prior to attending this meeting, ** believed that she would "be sharing information about [student]'s strengths and needs and pointing out things that might be helpful to him in designing an IEP." [Tr. 24:15-19.] Shortly after she arrived at the meeting, she was told that it was going to be a "good day because [student] was going to be awarded his diploma that they had determined that he had met the criteria and he had earned his diploma." [Tr. 24:23-25].

56. [Student] also was notified that Pine Hills had determined that he had earned sufficient credits to be awarded a regular high school diploma. [Student] was shown his diploma and was provided a photocopy. [Prehearing Order, Stipulated Facts, no. 8]. MDOC advised [student] and the ** that [student] had earned enough credits for a regular diploma. MDOC further advised that although [student] still had a qualifying disability, the award of a regular diploma terminated his right to ongoing special education and related services under the IDEA. As a result, MDOC and the Evaluation Team did not develop an IEP for [student] at the May 29, 2012 meeting.

57. Mr. Haffey agreed that the Evaluation Team discussed and concluded that [student] continued to qualify for special education services, but when determining which criteria was appropriate, he indicated that the evaluative material gave more weight to the emotional disturbance category than the category of autism. [Tr. 333-337; 367:16-25, 368:1; Ex. J-3, 858-864].

58. Mr. Haffey praised [student]'s efforts to complete the necessary hours to obtain the credits needed for graduation and to work on his GED coursework. Mr. Haffey explained that "credits are awarded based on usually the time in a given class. I'll give you a good example: 90 hours for a credit. So when you look at 235 hours, way above and beyond a credit, 180 hours if you say a full credit." [Tr. 369:3-8]. When asked if he analyzed whether [student] met the district's curriculum and assessment requirement or whether the district's requirement were aligned with Montana's content and performance standards, Mr. Haffey said no. However, he noted that his recommendations were based on what he saw in [student]'s request for a diploma. "I think he had a very legitimate concern to get his diploma. Being that close, I felt what I saw, between Pine Hills and the prison, that he should do that. And I also called some specific attention to some options that should be considered by the team…." [Tr. 370:18-24].

59. Ms. Goetz explained that the awarding of grades generally represents a student's achievement in the classroom, which relates back to their IEP. However, she explained that when a student with an IEP meets an IEP goal, that doesn't automatically mean the student will get a quarter credit, and if the student gets a quarter credit, it doesn't automatically mean that the student met their IEP goal. She was unaware of a Pine Hills' policy on how to determine whether a student has appropriately earned a credit. [Tr. 134:14-22, 135:1]. Dr. Jakupcak opined that after reviewing the content of those credits and the awarding of the credits, it appeared that they were based on attendance and [student]'s participation in those subject areas. [Tr. 213:13-16].

60. There is nothing in the record to indicate that MDOC provided a notice to [student] or to ** of the change in placement that occurred when [student] was awarded his diploma.

61. MDOC did not review or revise [student]'s IEP at the May 29, 2012 meeting or at any other time after expiration of the Pine Hills IEP in September 2011. Throughout the time period between February 25, 2012 and when the evaluation team meeting was held on May 29, 2012, [student] was still identified as a student with a disability under the IDEA and had not been awarded a diploma. [Student] was not provided educational services in accordance with his IEP after expiration of the Pine Hills IEP.

62. On August 1, 2012, [student] was evaluated by Amy Burton, Ed.S., and by Michael Jakupcak, Ed.D. Ms. Burton is a school psychologist trained and experienced in conducting psycho-educational testing. She has specialized experience in evaluating students suspected of having an autism spectrum disorder. [Ex. J-9]. Dr. Jakupcak is a retired special education teacher, special education administrator and school psychologist. He has specialized experience in working with students with learning disabilities and communication disorders. [Ex. J-8].

63. After completing [student]'s testing, Ms. Burton concluded that [student] had sufficient characteristics of Asperger's to meet the criteria for identification under the IDEA category of Autism. [Tr. 104:1-6]. Ms. Burton's written evaluation was provided to MDOC and Great Divide. [Ex. C].

64. Ms. Burton administered academic achievement testing and reported the results of her testing in a written educational evaluation. [Ex. C]. Ms. Burton concluded that [student] has a severe deficit in reading comprehension, such that his

reading comprehension level is approximately that of a ten year old. His reading skills show a wide discrepancy between abilities in specific areas. Most notably, [student] has a superior ability to identify and read words in isolation, but does not comprehend what he is reading. He has problems with both literal and inferential comprehension questions. Because he has areas of significant strength and areas of significant deficit in his reading, when reading scores are averaged together, he appears to have average reading abilities. However, this is not an accurate portrayal of his specific reading skills. Reliance upon average scores is misplaced, as it does not provide sufficient information from which to develop an appropriate IEP. In Ms. Burton's opinion, the WRAT-3 and the CTBS results were not individualized tests that would provide sufficient information about [student]'s specific academic strengths and needs from which to develop an appropriate IEP. Reading achievement tests conducted when [student] was younger are also not a reliable source for developing a current IEP, as they do not accurately convey [student]'s significant reading comprehension problems in recent years. When [student] was younger, his superior skill in reading words in isolation enabled him to "get by" on that skill. However, as he has gotten older and as material has gotten more complex, his significant reading comprehension deficits have become more prominent and problematic. [Tr. 76-79].

65. Ms. Burton's academic achievement testing revealed that [student] has mastery of only basic math concepts. Based on her review of testing data, she was of the opinion that [student] did not gain any math skills since academic achievement testing was conducted in 2006. [Ex. C; Tr. 84-86]. He has no understanding of Algebra, measurements, a very limited understanding of fractions, and could only

complete math word problems when they were read to him and he had unlimited time to complete them. [Ex. C; Tr. 74-75].

66. Ms. Burton identified, based on her testing and her review of records, that [student] has always scored low in academic fluency – reading fluency, math fluency, and writing fluency. Fluency refers to the time it takes to complete a task. [Student]'s slow reading fluency negatively impacts his ability to comprehend what he is reading. He has limitations in oral fluency, in that it takes him longer to speak and process information. [Tr. 74, 78]. Ms. Burton concluded that [student] was performing significantly lower in reading comprehension and some areas of math and that he had not gained skills in those areas since 2006. [Tr. 79, 86].

67. Dr. Jakupcak reviewed [student]'s educational records and identified several areas of educational need. One of the most striking was [student]'s slow rate of processing, which seemed to be a long-term issue with regard to how [student] learns and understands information. Secondly, Dr. Jakupcak identified [student]'s difficulties with reading and comprehension, noting that [student] has difficulty both retaining information and making judgments about what he has read. In the area of math, Dr. Jakupcak indicated that [student] has some strengths in computation but then the application of that information to solve problems is challenging to [student]. [Tr. 157-158].

68. Dr. Jakupcak opined that the evaluations that had been done while [student] was at Pine Hills were not done properly or were inadequate, and the resulting IEP that was developed based on those evaluations was inadequate. [Tr. 159:15-19].

69. In particular, Dr. Jakupcak opined that the September 2010 evaluation was lacking in that it did not include assessments in the area of academic achievement, individual achievement, issues of communication, a functional behavioral assessment, a psychological evaluation and a transition assessment. [Tr. 162:10-17].

70. Dr. Jakupcak also indicated that parental participation was necessary to gain information about the student outside of the academic situation, to gain perspective as to how that student operates outside of the educational realm and, equally important, to have a representative to support and advocate for that student. [Tr. 184:1-8].

71. Dr. Jakupcak also reviewed the evaluation conducted by Mr. Haffey and was of the opinion that the evaluation was not adequate or in compliance, noting the use of outdated cognitive measures, areas of unintelligible information, and references about the need for [student] to earn a diploma. According to Dr. Jakupcak, it is not appropriate in the field of psychological testing to use a test that has been replaced with a more current version, especially after three to four years have passed. [Tr. 97-100; 204-205]. While the use of a recently updated test is not a best practice, this test provided sufficient information to assess [student]'s intelligence and met the requirements of the IDEA. 34 C.F.R. 300.304(c)(1)(iii). However, as noted by Dr. Jakupcak, Mr. Haffey did not include sufficient background information, did not identify the educational implications of his test results, did not address [student]'s behavioral issues, and did not accurately identify [student]'s deficits in reading comprehension. [Tr. 204-209].

72. Mr. Haffey did not explore [student]'s diagnosis of Asperger's syndrome and whether [student] might be found eligible under the category of Autism. He utilized a screening tool for Asperger's, but indicated that none of the materials he reviewed referred to [student] having a diagnosis of Aspergers. Apparently, neither Mr. Haffey nor other evaluation team members reviewed the evaluative information provided by **, or the District Court orders, or information contained in [student]'s treatment records that suggested a diagnosis of Asperger's for [student]. [Tr. 206-207; Tr. 364].

73. Dr. Jakupcak also identified procedural defects related to the awarding of [student]'s diploma. Dr. Jakupcak was of the opinion that [student] did not meet the general curriculum requirements or proficiency to receive a general education diploma; that MDOC failed to provide notice of a change in placement prior to awarding the diploma, and that MDOC did not convene the required exit IEP meeting to determine whether [student] successfully achieved the goals on the IEP prior to awarding the diploma. These actions he maintained were procedural and substantive violations of the IDEA. [Tr. 213:1-215:1].

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the Conclusions of Law of this hearing officer are as follows:

1. The Findings of Fact that also constitute Conclusions of Law are incorporated in the Conclusions of Law by reference. Likewise, Conclusions of Law that also constitute Findings of Fact are incorporated in the Findings of Fact by reference.

2. Since the date of the enactment of the Education for All Handicapped Children Act of 1975, Congress has passed amended versions of the Act. The current

version is the Individuals with Disabilities Education Improvement Act of 2004 (IDEA), 20 U.S.C. §§ 1400 *et. seq.* The primary purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education which emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; . . ." 20 U.S.C. § 1400(d)(1)(A) (2004).

3. The IDEA has been implemented on the federal level by the adoption of regulations found at 34 C.F.R. Part 300.

4. Although the IDEA generally requires the provision of FAPE to students aged 3 through 21 (up to age 22), the IDEA defers to State law or practice with regard to the provision of FAPE to children aged 18 through 21.

5. The obligation to make a free appropriate public education available to all children with disabilities does not apply with respect to children — (i) aged 3 through 5 and 18 through 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children in those age ranges. 20 U.S.C. § 1412(a)(1)(B) (2004); 34 C.F.R. § 300.102.

6. The maximum age of eligibility under the IDEA for special education is 22, as 21 year olds are included within the range of ages to which FAPE applies. However, for students ages 18 through 21, Montana law or practice determines the maximum age of eligibility for special education and related services under federal and state laws. 20 U.S.C. § 1412(a)(1)(B) (1997, 2004).

7. Under Montana law, a child is entitled to attend school "when the child is 6 years of age or older on or before September 10 of the year in which the child is to

enroll but is not yet 19 years of age." Mont. Code Ann. § 20-5-101(1)(a). A child with a disability, who is 6 years of age or older and under age 19, is entitled to receive special education services. Mont. Code Ann. § 20-7-411(2).

8. Montana law allows the trustees of a school district the discretion to admit a child who is 19 years of age or older if there are exceptional circumstances. Mont. Code Ann. § 20-5-101(3). School district trustees also are given discretion to establish and maintain a special education program for a child with a disability who is 19 years of age or older and under age 22 years of age. Mont. Code Ann. § 20-7-411(4).

9. The IDEA also mandates that FAPE be available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school. 20 U.S.C. § 1412(a)(1)(A)(2004). This mandate includes students in youth correctional facilities and with some limitation, students in adult correctional facilities. 34 C.F.R. §§ 300.101-102; Alexander S. v. Boyd, 876 F. Supp. 773, 801 (D.S.C. 1995). Neither [student]'s status as a delinquent youth or serious juvenile offender, or his transfer to the jurisdiction of the District Court and placement at MSP preclude him from receiving special education and related services under the IDEA.

10. Montana law requires that during a period of confinement in a youth or adult correctional facility, "school-aged youth with disabilities must be provided an education consistent with the requirements of the Federal Individuals with Disabilities Education Act, 20 U.S.C. 1400, et seq." Mont. Code Ann. § 41-5-206(6).

11. Pine Hills School is a state-funded school operated through the MDOC. Pursuant to the IDEA, the Montana Office of Public Instruction has an inter-agency

agreement with the MDOC that sets for the obligations of the MDOC to students with IDEA disabilities. 20 U.S.C. § 1412(a)(12)(A)-(B); 34 C.F.R. § 300.2(b)(1)(iv); 34 C.F.R. § 300.33. Montana law specifically requires an inter-agency agreement between OPI and MDOC. Admin. R. Mont. § 10.16.3142.

12. The current inter-agency agreement between OPI and MDOC was signed in 2009, prior to [student]'s transfer to MSP. [J-3, 1082-1085]. The inter-agency agreement requires the provision of educational services to individuals with IDEA disabilities up to the age of 21. [J-3, 1082-1085]. The agreement explicitly states that "[a]n individual between the ages of 18-21 is qualified for IDEA services if during their last educational placement the individual was actually identified as being a child with an IDEA disability under § 602(3) or had an IEP." [Student] has been identified as a child with an IDEA disability since 2003 and had an IEP when he entered MSP in April 2011. Therefore, [student] would qualify based on age for continued IDEA services up until the end of the school year in which he turns 21, which is in May 2014.

13. The Interagency Agreement outlines the availability of modifications to the least restrictive environment requirement and transition services. If an individual would be 22 years or older before being released from prison, the transition requirements of the IDEA do not apply. [J-3, 1082-1085]. Clearly while [student] was a student at Pine Hills School, transition services should have been identified in his IEP. Upon review of the dispositional order placing [student] at MSP, it is not certain whether [student] will be 22 years or older when he is released from MSP and therefore, the inclusion of transition services in an IEP arguably may not be required.

14. The IDEA assures that all disabled children receive a "free appropriate public education" through the development of an "individualized educational program"

(IEP). 20 U.S.C. § 1400(d)(1)(A); Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 183, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). The IEP is a comprehensive statement of the educational needs of a student and the specially designed instruction and related services that will be employed to meet those needs. Burlington Sch. Comm. v. Dept. of Educ., 471 U.S. 359, 368 (1985). "The IEP is to be developed jointly by a school officer qualified in special education, the child's teacher, the parents or guardian, and where appropriate, the child. In several places, the Act emphasized the participation of the parents in developing the child's educational program and assessing its effectiveness." Id. at 394, *citing* 20 U.S.C. §§ 1400(c), 1401(19), 1412(7), 1415(b)(1)(A), (C), (D), (E), and 1415(b)(2); 34 C.F.R. § 300.345 (1984).

15. The IDEA "imposes extensive procedural requirements upon States receiving federal funds under its provisions. Parents or guardians of handicapped children must be notified of any proposed change in 'the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to such child, and must be permitted to bring a complaint about 'any matter relating to' such evaluation and education." Rowley, 458 U.S. at 182.

16. The United State Supreme Court in Rowley examined the legislative intent behind the IDEA's procedural safeguards: "It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, see, *e. g*., *§§ 1415(a)-(d)*, as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of

the IEP, as well as the requirements that state and local plans be submitted to the Secretary for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." Rowley, 458 U.S. at 206.

17. "Parents and guardians play a significant role and must be informed about and consent to evaluations of their child under the Act. 20 U.S.C. § 1414(c)(3). Parents are included as members of "IEP teams." 20 U.S.C. § 1414(d)(1)(B). Parents must be given written prior notice of any changes in an IEP, 20 U.S.C. § 1415(b)(3), and be notified in writing of the procedural safeguards available to them, 20 U.S.C. § 1415(d)(1)." Schaffer v. Weast, 126 S. Ct. 528, 532 (2005).

18. The burden of compliance with IDEA in a correctional setting can be "tremendous drain on the resources and staff," and problems obtaining school records may make it difficult for staff to do an adequate job of developing IEPs for juveniles who are committed to the long-term institutions and who undoubtedly need these programs. Alexander S. v. Boyd, 876 F. Supp. 773, 800. In Alexander S., the South Carolina District Court identified a disproportionately high number of juveniles at correctional school facilities who had a "disability" under IDEA, and for whom the institution was obligated to formulate and implement an IEP. There, the educators admitted that perhaps as many as fifty percent of the juveniles were in need of special education. The South Carolina District Court found that the correctional institutions had not adequately identified juveniles in need of special education and, in some instances, had not fully formulated and implemented IEPs for those juveniles who had been identified. The court further identified several problem areas related to obtaining

educational records and a State requirement compelling the formulation of not one but two IEPs for the juvenile, one during the juvenile's brief stay at a reception center and another when the juvenile was confined to a long-term institution. The Court in Alexander S. found that without school records, educators were unable to properly develop an IEP. Id. The Court also recognized that corrections staff exerted considerable effort to arrange for the parental meeting because letters were often returned undelivered, and parents often refused to attend the meetings. Id. 876 F. Supp. at 801, fn. 47. The school structure as described in Alexander S. is similar to the school structure at Pine Hills, but despite the nature of the school, the delivery of school instruction and the difficulty engaging parents, the institution is not exempt from implementing the IDEA.

19. The Supreme Court has held that "a court's inquiry in suits brought under [the IDEA] is twofold. First, has the State complied with the procedures set forth in the Act. And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" Rowley, 458 U.S at 206-07.

20. Compliance with the IDEA procedures is "essential to ensuring that every eligible child receives a FAPE, and those procedures which provide for meaningful parental participation are particularly important." Amanda J. v. Clark County Sch. Dist., 267 F.3d 877, 890 (9th Cir. 2001).

21. Procedural flaws in the IEP process do not always amount to a denial of a FAPE. L.M. v. Capistrano Unified School Dist., 556 F.3d 900, 909 (2009), citing Target Range Sch. Dist. No. 23, 960 F.2d 1479, 1483 (9th Cir. 1992).

22. Once a procedural violation of the IDEA occurs, it must be determined whether that violation affected the substantive rights of the parent or child. Procedural inadequacies that result in the loss of educational opportunity, or seriously infringe upon the parents' opportunity to participate in the IEP formulation process, clearly result in the denial of a FAPE. Ms. S. ex. rel. G. v. Vashon Island School Dist., 337 F. 3d 1115, (9th Cir. 2003); Capistrano, 556 F.2d at 909, *citations omitted*.

23. As explained by the Ninth Circuit Court: "Denying parental access to the IEP process is a serious procedural violation of the IDEA. . . . 'Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. Parents not only represent the best interest of their child in the IEP development process, they also provide information critical to developing a comprehensive IEP and which only they are in a position to know.'" Ms. S. ex. rel. G., 337 F.3d at 1131, *citing* Amanda J., 267 F.3d at 882.

24. If the educational rights of the student can be resolved under the first prong of the analysis, there is no need to determine the substantive appropriateness of a school district's proposed placement. Target Range. 960 F.2d at 1485, *citing* Rowley, 458 U.S. at 201, 204-05. A court need not reach the question of substantive compliance if the court finds procedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the IEP formulation process, or that caused a deprivation of educational benefits. Hellgate, 541 F.3d at 1212-13.

25. Regulations to the IDEA address the issues of obtaining parental consent when a parent fails to respond to a request for reevaluation. "Informed parental

consent need not be obtained for reevaluation if the public agency can demonstrate that it has taken reasonable measures to obtain that consent, and the child's parent has failed to respond." 34 C.F.R. § 300.505(c)(1). "To meet the reasonable measures requirement, the public agency must use procedures consistent with those in §300.345(d). 34 C.F.R. § 300.505(c)(2). These procedures include: "detailed records of telephone calls made or attempted and the results of those calls; copies of correspondence sent to the parents and any responses received; and detailed records of visits made to the parent's home or place of employment and the results of those visits." 34 C.F.R. § 300.345(d)(1-3).

26. The IDEA requires procedural safeguards that protect the rights of the child whenever the parents of the child are not known, or the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual to act as a surrogate for the parents. The assignment of a surrogate is to occur not more than 30 days after there is a determination that the child needs a surrogate. 20 U.S.C. § 1415(b)(2)(A)-(B); 34 CFS 300.519(a)-(b); Mont Code Ann. § 20-7-461.

27. Montana law is specific in its requirement that, within 10 days of determining the child is in need of a surrogate parent, a school district or institution must file the necessary petition with the Youth Court nominating and seeking appointment of an appropriate surrogate parent. Mont. Code Ann. § 20-7-461(1); Admin. R. Mont. § 10.16.3504.

28. After attempting to contact [student]'s biological parent by mail, without success, Pine Hills took no other action to contact [student]'s parent, even though a telephone number was contained in [student]'s records. Although it was apparent

from the educational records received from Southern Peaks that [student]'s designated "parent" was a CFS social worker, no action was taken to determine whether [student] was a ward of the state, either because of his dependent status through CFS or his delinquent status when he was committed to the custody of MDOC. *See* Taylor v. Honig, 977 F.2d 591 (9th Cir. 1992)(when delinquent youth was removed from parental custody, the youth became a ward of the state; youth's probation officer became his legal guardian under California law; the probation officer, not the youth's parents, was the proper person to receive notice for purposes of 20 U.S.C. § 1415(b)(1)(C) and to make agreements pursuant to § 1415(e)(3)).

29. If [student]'s parent could not be located, Pine Hills had a legal obligation to seek the appointment of a surrogate parent for [student]. Pine Hills failed to take reasonable steps to locate [student]'s parent when they attempted to contact her only through mail. The lack of reasonable efforts and failure to involve a parent or surrogate parent for [student] resulted in a number of procedural violations: the failure to obtain parental consent to reevaluate [student]; the failure to allow parental participation in both the Evaluation Team meeting and development of [student]'s IEP, and a failure to obtain consent to implement [student]'s IEP. 34 C.F.R. §300.304(b). Had Pine Hills complied with the procedural requirements as set forth in both federal and Montana law and sought the appointment of a surrogate parent, Pine Hills could have obtained consent to conduct the appropriate evaluations and upon completion of the evaluations, the IEP team could have reconvened to develop and implement [student]'s IEP with the consent of the surrogate parent. As previously discussed, the failure to protect the parents' right to be involved in the development of their child's educational plan is one of the most important procedural safeguards. The failure of

Pine Hills to take reasonable actions to attempt to locate [student]'s parent or seek the appointment of a surrogate parent were procedural violations that seriously infringed on the parents opportunity to participate in the IEP process and resulted in a substantive denial of FAPE for [student].

30. A public agency has an affirmative duty to ensure an appropriate, comprehensive evaluation is conducted. Failure to do so is a denial of FAPE. *See, e.g.,* Hellgate, 541 F.3d at 1209-10; Union Sch. Dist. v. Smith, 15 F.3d 1519, 1523 (9th Cir. 1994).

31. The first requirement in any reevaluation is for the IEP team and other qualified professionals, as appropriate, to review existing evaluation data on the child. 34 C.F.R. § 300.305(a)(1). On the basis of the review of existing data, and input from the child's parents, the IEP team must identify what additional data, if any, are needed to determine "the present levels of academic achievement and related developmental needs of the child" and "[w]hether any additions or modifications to the special education and related services are needed." 34 C.F.R. § 300.305(a)(2).

32. Existing evaluative data is an important component of the reevaluation and, as of September 16, 2010, [student] had been receiving IDEA services for seven years. The list of evaluation data to be reviewed by the team set forth in 34 C.F.R. § 300.305(a)(1) is inclusive and sets forth the evaluative data that must be reviewed, including evaluations and information provided by the child's parent.

33. Pine Hills staff developed an Evaluation Plan, which included classroom observations and some academic testing. While this information assisted in determining [student]'s current level of educational functioning, whether behaviorial interventions were necessary, and any modifications that would be appropriate for

[student], it did not include a review of [student]'s psychological and/or treatment records to assess his social or emotional status. These records likely contained relevant evaluative information that would have assisted in a more comprehensive Evaluation Plan for [student]. Because a parent was not present, the review did not include information or evaluations provided by the parent.

34. The IDEA requires an evaluation to be "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified." 34 C.F.R. §300.304(c)(6). Additionally, the child must be "assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities." 34 C.F.R. § 300.305(c)(4). Pine Hills School did not assess [student] in all areas related to the suspected disabilities. The school knew [student] had been identified as a student with emotional disturbance while at Southern Peaks, but failed to assess his social and emotional status during the period of reevaluation. Pine Hill's failure to conduct a comprehensive evaluation using [student]'s existing evaluative data and failure to assess [student] in all areas of suspected disability resulted in procedural violations of the IDEA.

35. Procedural compliance is essential to ensuring that every eligible child receives a FAPE. Amanda J., 267 F.3d at 887, 891. Procedural inadequacies that result in the loss of educational opportunity clearly result in the denial of FAPE. Amanda J., 267 F.3d at 891; W.G. v. Bd. of Trustees of Target Range, 960 F.2d 1479, 1484-85 (9th Cir. 1992). A court need not reach the question of substantive compliance if the court finds procedural inadequacies that result in the loss of

educational opportunity or that caused a deprivation of educational benefits. Hellgate, 541 F.3d at 1212-13. In this case, the procedural inadequacies regarding parental participation and evaluation have resulted in a loss of educational opportunity for [student] and a denial of FAPE.

36. The IEP is a written statement for each child with a disability that is developed, reviewed and revised in a meeting in accordance with 34 CR §§ 300.320 through 300.324. The IEP must include, among other components: 1) a statement of the child's present levels of academic achievement and functional performance; 2) a statement of measurable annual goals designed to meet the child's needs; 3) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child; 4) a statement of the program modifications or supports for school personnel; and, in the case of a child whose behavior impedes learning, a consideration of the use of positive behavioral interventions and strategies, and other strategies, to address that behavior. 34 C.F.R. §§ 300.320(a) and 300.324(a)(2).

37. "Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include" appropriate post-secondary goals and the transition services needed to assist the child in reaching those goals. 34 C.F.R. § 300.320(b). Transition services must be designed within a results-oriented process that is focused on improving the academic and functional achievement of the student to enable her to move from school to post-school activities. 20 U.S.C. § 1401(34); 34 C.F.R. § 300.43(a)(1).

38. The specific services to be offered in a transition plan include: (1) instruction, (2) related services, (3) community experiences, (4) development of employment and other post-school adult living objectives, and (5) if appropriate, acquisition of daily living skills and a functional vocational evaluation. 34 C.F.R. § 300.43(a)(2).

39. A court must determine the appropriateness of the IEP at the time it is made. Adams v. State of Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999). At the time [student]'s IEP was developed, staff sought sufficient information to develop the required components of the IEP. Although [student]'s treatment records were not reviewed and no information was provided by a parent, staff initiated classroom observations, reviewed the results of the CTBS Basic Battery Plus test and a Kaufman Brief Intelligence Test to determine his current level of functioning, and [student] was interviewed to determine his post-secondary goals, so that a transition plan for [student] could be developed for [student].

40. The Ninth Circuit has held that an educational plan must be judged according to information available at the time the plan was implemented. "Actions of the school systems cannot ... be judged exclusively in hindsight. ... An individualized education program ("IEP") is a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." Adams, 195 F.3d at 1149-50, quoting Fuhrmann v. E. Hannover Bd. of Educ., 993 F.2d 1031, 1041 (3d Cir. 1993).

41. The Ninth Circuit has held that the prohibition against the exclusive use of hindsight does not preclude some consideration of subsequent events. Adams, 195

F.3d at 1149-1150. “The clear implication of permitting some hindsight is that additional data, discovered late in the evaluation process, may provide significant insight into the child's condition, and the reasonableness of the school district's action, at the earlier date.” E.M. v. Pajaro Valley Unified Sch. Dist., 652 F.3d 999, 1006 (9th Cir. 2011).

42. Subsequent evidence of progress or lack of progress is a relevant factor in determining the appropriateness of the IEP at the time it was made, but it is not outcome determinative. As determined in the Findings of Fact, the objective test results obtained by Ms. Burton show that [student] made no gains in academic skills between 2006 and 2012, and further that he scored lower in some areas, suggesting he regressed. Ms. Burton’s testing is credible based on her professional qualifications, her thorough testing procedures, and her comprehensive review of [student]’s records. Her opinion supports the conclusion that [student]’s IEP was not reasonably calculated to provide him meaningful educational benefit.

43. The fact that [student] may have incidentally received some educational benefits during his year at Pine Hills School, in that he was able to successfully complete most of the 7th grade math materials, does not cure the deficient IEP or overcome the contrary objective testing results. The relevant inquiry is whether the IEP was reasonably calculated to provide educational benefit.

44. The Pine Hills IEP, especially when compared with the IEP that was developed for [student] during his placement at Southern Peaks, does not identify the special education and related services or transition services for [student] in the IEP and does not contain any type of behavior plan for [student]. The Pine Hills IEP also notes that there was parental agreement that a reevaluation “is unnecessary.” These

deficits may have been the result of the lack of parental participation or the lack of evaluative information, but underscore the importance of parental participation to ensure that the educational needs of the disabled child are adequately addressed.

45. A public agency must review and revise a student's IEP at least annually. 20 U.S.C. § 1414(d)(3)(A) & (d)(4)(A); 34 C.F.R. § 300.324(a)(1) & (b)(1). MDOC had the affirmative duty to develop an IEP reasonably calculated to meet [student]'s unique needs and provide him with a FAPE on or before September 16, 2011.

46. It is uncontested that MSP failed to develop an IEP for [student] prior to the expiration of the Pine Hills IEP on September 16, 2011, or at any time thereafter.

47. [Student] was evaluated by MDOC on February 25, 2012 through its contractor, Great Divide Educational Services Cooperative. After completion of the testing, MDOC was required to convene a team meeting and consider the results of that evaluation in developing and revising [student]'s IEP. 20 U.S.C. § 1414(d)(3)(A)(iii), (d)(3)(B)(iv)-(v), & (d)(4)(A)(I). The Evaluation Team did not meet to review the results until three months later on May 29, 2012.

48. The IDEA requires an IEP to be developed within 30 days of an initial evaluation finding a child eligible for special education and related services. 34 C.F.R. § 300.324(a)(2); see also, 71 Fed. Reg. 46,680 (2006). Thirty days is also a reasonable time within which to revise a student's IEP after reevaluation.

49. The MDOC had the duty to convene the Evaluation Team within a reasonable time to review revise [student]'s IEP. By the time the Evaluation Team meeting was held, [student] had missed three months of special education and related services. The MDOC's failure to review and revise [student]'s IEP within a reasonable time after the reevaluation conducted in February 2012 resulted in a loss of

educational opportunity that compounded MDOC's ongoing failure to develop and implement an annual IEP for [student] throughout the 2011-12 school year.

50. At the Evaluation Team meeting held May 29, 2012, MDOC and Great Divide personnel did not review the existing evaluative information to appropriately consider whether [student] met the criteria for Autism or Asperger's Disorder. While there were discussions about whether [student] would continue to qualify for services and if so, under which disability category, nothing in the record reflects a review of the independent educational evaluation administered by Dr. Shackford and provided by ** that could have led the team to conclude that [student] did qualify as a student with autism. Given the fact that even the ** District Court order committing [student] to the custody of MDOC indicated a directive to accommodate [student]'s Asperger's Disorder, it is unreasonable to believe that nothing in [student]'s records contained information about his diagnosis of Asperger's Disorder.

51. Both Dr. Jakupcak and Ms. Burton testified that Dr. Shackford's evaluation contained assessment results and other information that were highly relevant to educational planning for [student]. The evaluation was paid for by the MDOC as an independent educational evaluation under 34 C.F.R. § 300.502. A parent-initiated evaluation, whether obtained at public expense or paid for by the parent, must be considered by the public agency in any decision made with respect to the provision of FAPE for the child. 34 C.F.R. § 300.502(c)(1). The Evaluation Team's refusal to discuss Dr. Shackford's psycho-educational evaluation violated the IDEA procedures and contributed to [student]'s loss of educational opportunity.

52. The IDEA also explicitly allows the submission of an independent evaluation as evidence in a due process hearing. However, because Dr. Shackford

was not available as a witness at the Due Process Hearing, his evaluation was admitted into evidence for limited purposes. 34 C.F.R. § 300.502(c)(2).

53. The record indicates that efforts were made by MDOC, as a result of [student]'s request to obtain his diploma, to facilitate changes in his educational plan so that he could obtain the credit hours necessary to complete the educational credits that he did not complete while at Pine Hills. These actions required a coordinated effort by MDOC and Pine Hills, and required a significant number of hours of instruction to meet the hours of instruction generally required for the award of a credit. It is apparent that MDOC sought to provide educational services to [student] so that he could complete the number of hours of instruction required to obtain the credits necessary to obtain his diploma and achieve his individual goal. MDOC believed the award of the diploma was appropriate because [student]. earned the remaining credits, [student] worked diligently to obtain the credits for graduation, and [student] demonstrated competency by passing four of the five GED courses. Upon obtaining the credits and receiving the diploma, MDOC understood that [student] would no longer be eligible for special education under the IDEA. Based on the evidence presented, [student] clearly met the hours of instruction required by Pine Hills to receive credits toward graduation, however, the evidence does not support a finding that the units of credit that [student] earned were sufficiently aligned with the "content and performance standards" adopted by the State of Montana for the award of a regular diploma. Admin. R. Mont. § 10.55.904.

54. The IDEA does not specify the precise requirements that must be met for a student to earn a regular diploma. The determination of whether a student has earned a regular diploma is made pursuant to State law. Establishment of appropriate

substantive standards for graduation is a matter of state law for both disabled and non-disabled students. The U.S. Department of Education's Office of Special Education Programs (OSEP) has explained that students with disabilities do not have a guaranteed right to receive a regular high school diploma. Letter to Anonymous, 22 IDELR 456 (OSEP, Response to Inquiry, 1994).

55. Under Montana law, a student is eligible for a regular diploma if he or she meets one of the following two conditions. The student must either earn the required number of credits, as specified in Administrative Rules of Montana § 10.55.905-906, or successfully complete the goals identified in an Individualized Educational Program (IEP), as specified in Administrative Rules of Montana §10.55.805(4); see also, § 10.16.3345(5).

56. Montana law requires a minimum of 20 units of credit for graduation, Admin. R. Mont. §§ 10.55.905(1) and 906(1); 13 of the 20 required credits must be in content areas specified by § 10.55.905. The 20 units must be aligned with and enable students to meet the "content and performance standards" adopted by the State of Montana. Admin. R. Mont. § 10.55.904. Local school districts are required to incorporate all content and performance standards into their curriculum, implement the standards, and assess the progress of all students in meeting the standards. Admin. R. Mont. §§ 10.55.603(1), 10.55.1001. Because Pine Hills School is a state-funded school, it does not have a local board of trustees. There was no evidence presented that Pine Hills imposes a greater number of credits or imposes specific content and performance standards more detailed than those imposed by state law. Therefore, the administrative rules regarding minimum requirements for graduation should apply to determine whether the units of credit meet the content and performance standards.

57. "Content standard" means what all students should know, understand, and be able to do in a specific content area, such as reading, mathematics, or social studies. Admin. R. Mont. § 10.54.2502(2). "Performance standard" means the specific expectations for performance in each content area. Admin. R. Mont. § 10.54.2502(4). There are four performance levels: advanced, proficient, nearing proficiency, and novice. Admin. R. Mont. §§ 10.54.2501, 2502(3). A unit of credit may only be given for "satisfactory completion of a full-unit course." Admin. R. Mont. § 10.55.906(1). Thus, for a student to earn the 20 credits required for graduation with a regular high school diploma under Administrative Rules of Montana § 10.55.906(1), the student must have met minimum performance standards in those content areas. The earning of credits for a high school diploma is, under Montana law, inextricably linked to the regular academic curriculum.

58. The grading and advancement system implemented by schools is an important factor in determining educational benefit. "Children who graduate from our public school systems are considered by our society to have been 'educated' at least to the grade level they have completed, and access to an 'education' for handicapped children is precisely what Congress sought to provide in the Act." Rowley, 458 U.S. at 203.

59. Many students with disabilities who receive instruction and related services under the IDEA will satisfactorily complete full-unit courses in the academic areas specified by Montana law and thus, earn credits. Some students with disabilities do not satisfactorily complete full-unit courses and for these students, a diploma may be awarded upon successful completion of their IEP goals.

60. [Student] did not satisfactorily complete full-unit courses in the identified academic areas, as needed to earn the 20 units of credit required for graduation by Administrative Rules of Montana § 10.55.906(1). The credit-based diploma awarded to [student] was based upon a participation in attaining a required number of hours of educational study and not achieving the regular education curriculum provided to Montana high school students. For example, [student] was awarded high school credit for completing seventh grade math content. He did not meet content and performance standards for high school math. Rather, he was awarded credit for accomplishing his IEP goal to progress from 7th grade to 8th grade math. As such, his diploma was not a "regular" diploma for purposes of terminating eligibility and services under the IDEA.

61. The IDEA explicitly states that earning an alternative diploma or a GED is not sufficient to terminate eligibility under the IDEA. 34 C.F.R. § 300.102(a)(3)(iv). In this case, [student] demonstrated the ability to pass four of the five tests required to attain a GED. He was not able to pass the math test and did not earn his GED. Pine Hills School awarded a regular credit-based diploma to [student] erroneously, in that [student] pursued a differentiated curriculum, functioned at the elementary school level in math and reading, and did not meet the content performance and standards for the high school level core academic curriculum. The diploma awarded to [student] is not the type of regular diploma that serves to terminate his eligibility under the IDEA. It is more akin to a GED or alternative diploma than a regular diploma.

62. Case law supports the principle that a diploma awarded on the basis of a differentiated curriculum does not effectively terminate IDEA eligibility. In finding that the award of a regular diploma effectively terminated IDEA services for a student in

Texas, the Fifth Circuit specifically relied upon the fact that the student obtained a "high school level education" sufficient for graduation and that there was no evidence that the student "regressed educationally or could not measure up to ordinary grade-level standards." Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390, 2012 U.S. App. LEXIS 16293, *25-26 (5th Cir. 2012). Unlike [student], the student in Hovem had earned above-average grades in Algebra 2, Chemistry, United States History and other high school level courses. Because the credits earned by [student] were based primarily on the number of hours of instruction in a specific subject area and not on meeting the content performance and standards for the high school level core academic curriculum, the IEP team should have reviewed [student]'s IEP to determine whether he sufficiently attained the goals and objectives contained in the IEP to receive a diploma and terminate services under the IDEA.

63. The IDEA regulations make reference to exit documents in the statement that receipt of a "regular high school diploma" ends the entitlement to special education. 34 C.F.R. § 300.122(a)(3)(i). However, the entitlement to special education "does not apply to students who have graduated but have not been awarded a regular high school diploma." 34 C.F.R. § 300.122(a)(3)(ii). The regulations also note that graduation constitutes a change in placement for a student on an IEP. 34 C.F.R. § 300.122(a)(3)(iii). OSEP has explained that school districts should re-evaluate the student's IEP prior to graduation in order to assess whether the student has met all of the requirements necessary for receipt of a diploma. 22 IDELR 456; Letter to Richards, 17 EHLR 288 (OSEP, Response to Inquiry, 1990). With respect to a decision concerning graduation, particularly when students have successfully completed their IEPs but will not receive a diploma, parents are entitled to the due

process protections afforded under the IDEA, namely, the right to prior written notice and the right to an impartial due process hearing. 34 C.F.R. § 300.503-300.514; 22 IDELR 456; 16 EHLR 307.

64. Termination of services may occur when a student is determined to no longer qualify as a student with a disability. However, "a public agency must evaluate a child with a disability in accordance with Sec. 300.304 through 300.311 before determining that the child is no longer a child with a disability." 34 C.F.R. § 300.304(e)(1). While MDOC administered the reading and language TABE tests to [student] to assess his level of functioning on May 18, 2012, and Mr. Haffey had administered a comprehensive evaluation in February 2012, these evaluations did not conclude that [student] would no longer qualify as a student with a disability. Even though MDOC asserted that [student] was no longer eligible for special education services because he completed the units of credit required to graduate, Mr. Haffey indicated that as a result of his evaluation and team discussions in May 2012, [student] was still a qualified student with a disability. A public agency cannot unilaterally cease to provide special educational services without following the mandatory procedures in the IDEA. The unilateral termination of services to [student] was violation of the IDEA and the agency's affirmative duty to [student].

65. Pine Hills School's award of a regular high school diploma to [student] violated his right to FAPE under the IDEA. As a result of [student]'s failure to earn the required credits for graduation, pursuant to Administrative Rules of Montana § 10.55.906(1), [student] did not earn a regular high school diploma under Montana law.

66. A student's statutory entitlement to FAPE continues until the student earns and is awarded a regular diploma or until the student reaches the maximum age of

eligibility under State law or practice, whichever occurs first. 20 U.S.C. §§ 1412(a)(1)(B), 1414(c)(5)(B)(I) (2004); 34 C.F.R. § 300.102(a)(3).

67. MDOC has failed to provide [student] FAPE from September 16, 2010 through at least May 29, 2012. [Student] is entitled to receive special education services under the IDEA until either he successfully attains a regular diploma that is aligned with the content and performance standards defined under Montana law, until the IEP team determines that he has successfully completed the goals and objectives outlined in a IEP that has been developed in accordance with the procedural safeguards outlined under the IDEA, or until his is no longer eligible for services because of his age.

68. Under the IDEA, the burden of proof in an administrative hearing challenging the appropriateness of an Individualized Education Program is on the party seeking relief, which in this case is [student]. Schaffer v. Weast, 126 S. Ct. 528, 531 (2005).

69. This hearing officer has heard all the evidence, weighed it thoroughly, and has determined that [student] was not provided FAPE by the MDOC either at Pine Hills School or at MSP during the time period from September 16, 2010 through the current date, as set forth in this opinion. Where findings have been made regarding the MDOC failing to provide FAPE to [student], this hearing officer has found [student]'s evidence to be more thorough, credible and persuasive and, in these areas, finds that [student] has met his burden of proof.

ORDER

Having determined that MDOC has failed to provide FAPE for [student, [student] is entitled to appropriate relief. A second hearing shall be held to determine an

appropriate remedy for the denial of FAPE. Having determined that [student] remains eligible for special education and related services under the IDEA, MDOC is hereby ordered to comply with its affirmative duties under the IDEA.

Counsel for the parties shall participate in a prehearing conference call on November 14, 2012 at 4:00 o'clock p.m., or at a time otherwise agreed to by the parties, for the purpose of setting further hearing to determine an appropriate remedy for the denial of FAPE and to address any related issues.

DATED this 10th day of November, 2012.

/s/ Leslie Hallilgan
Leslie Halligan, Hearing Officer

CERTIFICATE OF SERVICE

This is to certify that on the 10th day of November, 2012, a true and exact copy of the foregoing was send by electronic mail (as noted), and deposited for delivery by standard mail delivery to:

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DATED this 10th day of November, 2012.

/s/ Leslie Halligan
Leslie Halligan, Hearing Officer